SUPREME COURT, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 89-1505

JOAN BETTS DIPLARAKOS,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
EDWARD T. FOGEL, JR.
Senior Assistant Attorney General
DONALD E. de NICOLA
Supervising Deputy Attorney General
TRICIA ANN BIGELOW
Deputy Attorney General
[Attorney of Record]
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2244
Attorneys for Respondent

BEST AVAILABLE COPY

TABLE OF CONTENTS

		Pages
STATEMENT OF THE CASE		1
REASONS WHY THE PETITION SHOULD BE DENIED		12
ARGUMENT		12
I	THE PETITION MERELY SEEKS REVIEW OF THE STATE APPELLATE COURT'S APPLICATION OF STATE LAW TO SPECIFIC FACTS	12
II	PETITIONER'S FAILURE TO PROPERLY PRESERVE THE FEDERAL CLAIM AT THE TRIAL AND APPELLATE LEVEL PRECLUDES REVIEW BEFORE THIS COURT	15
III	PETITIONER HAS FAILED TO PRESENT AN "IMPORTANT" QUESTION SUFFICIENT TO WARRANT THE GRANT OF CERTIORARI	19
IV	REPLACEMENT OF JUROR NUMBER EIGHT, MS. CARTER, FOR GOOD CAUSE WAS IN ACCORDANCE WITH THE SIXTH AMENDMENT	22
CONCLUSION		30

TABLE OF AUTHORITIES

Pages

Cases

Beck v. Washington
369 U.S. 541 (1962) 18

Cabana v. Bullock
474 U.S. 384 (1986) 23

City of Canton, Ohio v. Harris
___ U.S. ___, 109 S.Ct. 1197 (1984) 15

DeShaney v. Winnebago County DSS
___ U.S. ___, 109 S.Ct. 988 (1984) 15

In re Lamkin
355 U.S. 59 (1957) 16, 17

Miller v. Stagner
757 F.2d 988 26, 28
U.S. cert. den. 475 U.S. 1048
(9th Cir. 1985)

Oklahoma City v. Tuttle
471 U.S. 808 (1985) 17

People v. Abbott
47 Cal.2d 362, 303 P.2d 730 (1956) 28

People v. Burgener
41 Cal.3d 505 (1986) 24

People v. Callegri
154 Cal.App.3d 856 (1984) 18

People v. Coleman
46 Cal.3d 749 (1988) 17

People v. Farris
66 Cal.App.3d 376, 136 Cal.Rptr. 45 (1977) 28

TABLE OF AUTHORITIES (Cont'd.)

	Pages
People v. Ghent 43 Cal.3d 739 (1987)	27
People v. Norris 40 Cal.3d 51 (1985)	18
People v. Sassounian 182 Cal.App.3d 361 (1986)	17
People v. Wright 48 Cal.3d 168 (1989)	17
Remmer v. United States 347 U.S. 227 (1953)	20
Smith v. Phillips 455 U.S. 209 (1981)	20
Tanner v. United States ___ U.S. ____, 107 S.Ct. 2739 (1987)	14, 21
United States v. Brown 823 F.2d 591 (D.C. Cir. 1987)	27
United States v. Butler 822 F.2d 1191 (D.C. Cir. 1987)	21
United States v. Johnston 268 U.S. 220 (1925)	14
United States v. Perez 658 F.2d 654 (9th Cir. 1981)	20, 21, 28
United States v. Peterson 524 F.2d 1167 (4th Cir. 1975)	21
United States v. Phillips 664 F.2d 971, 992 (5th Cir. 1981)	26, 29

TABLE OF AUTHORITIES (Cont'd.)

	Pages
United States v. Polizzi 500 F.2d 856 (9th Cir. 1974)	21
United States v. Renfro 620 F.2d 569 (6th Cir. 1980)	23
Wainwright v. Witt 469 U.S. 412 (1985)	13, 27

Statutes

Cal. Evid. Code § 353	17
Cal. Pen. Code §§	
1089	13, 24
1123 (repealed Stats. 1988, ch. 1245 § 42)	13, 24

Rules of Court

Cal. Rules of Court		
rules	29(b)(1)	18
	977	20

TABLE OF AUTHORITIES (Cont'd.)

Pages

Constitution

U.S. Const. Sixth Amendment 15, 16, 18, 23

Seventh Amendment 16

Cal. Const., art. I, § 16 16

Federal Rules

Fed. Rules Crim. Proc., rule 24(c) 26

Supreme Court Rules

U. S. Sup. Court Rules, rule 10 19, 20

No. 89-1505

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

JOAN BETTS DIPLARAKOS,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF OF RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

Trial in this case lasted approximately two months. On the fifth day of deliberations, the jury foreman, Karen Carter, sent the trial court a message: "'We cannot come to a decision on the projects we have discussed. We are deadlocked. We need some instructions on how you want these verdicts

under these conditions.'" (RT 2072-2073.) The trial court responded: "'Would you please tell me if during your deliberations thus far, you have discussed the merits of each count charged?" They replied: "'No. The jurors feel we need an interview with you on procedures. We are deadlocked regarding interpretation of the evidence. (11-1.)'"[1] The trial court wrote back that the jurors should not consider themselves to be deadlocked until they had considered the evidence as to all counts and that, if the court could be of any further assistance regarding the law, procedures for deliberation or anything else, they should submit additional written questions. (RT 2073-2074.)

Foreman Carter submitted a note that read: "One juror feels that intent to defraud cannot be proven because the defendant had asked and filed for reorganization rather than

---

1. The first sentence of this note was marked out by interlineation. (RT 2073.)

bankruptcy. Eleven jurors feel that whether or not the defendant had assets or filed for reorganization rather than bankruptcy is not relevant. It is not the issue. Eleven jurors feel that one juror has a closed mind and is not willing to consider the evidence objectively." Where the foreman was supposed to sign, it read: "Note prepared by eleven jurors"; below that, it was signed by Ms. Carter as foreman. (RT 2074.)

The judge then discussed with counsel how to respond. After some discussion, the trial court decided to reinstruct the jury regarding certain elements of the offense and procedure. (RT 2075-2083.)

The following day, the trial judge indicated it had received a note from foreman Ms. Carter, which read: "The jury feels that I am holding them up and that I should ask you to disqualify me as a juror. I feel that I am losing a battle to have my own opinion." (RT 2084.)

The judge was of the view "there is a possible allegation of juror misconduct by the other jurors in that there was some question at the prior questions that one juror was not following procedures." The judge wanted to question Ms. Carter and ask her to elaborate on her point of view, and see whether she was willing to deliberate openmindedly on each count; but the judge acknowledged it was a touchy situation and said he did not want to pressure her. Defense counsel did not believe such questioning would be proper, but the trial judge decided to question Ms. Carter.

In chambers, the judge assured Ms. Carter it was "not in any way attempting to pressure [her] as to what [her] decision should be in the case, but [it was] merely trying to find out what the meaning of [her note was]." She said one of the jurors in particular felt she should disqualify herself because she said she needed time to look into

the records to satisfy herself. She said she was the only one who looked into the box of evidence in the jury room. She said the others had made up their minds and felt that she should have made up her mind and was wasting the taxpayers' money. The court asked her whether she had discussed with the other jurors the merits of all the counts. She said they had not gone through every one; whenever she requested they go through one they would say there was no use, she had a closed mind. She would tell them she had not made up her mind; she had not looked at the evidence. (RT 2100-2102.)

The trial judge reread for Ms. Carter CALJIC No. 17.40, which instructs the jurors to decide the case for themselves after discussing the evidence and instructions with the other jurors, and tells them they should not hesitate to change an erroneous opinion if they become convinced it is erroneous but they should not decide any question in a particular

way because a majority of the jurors favor such a decision. (CT 185.) The court asked her whether she felt she could comply with the instruction and she responded that she could. She was then excused from chambers. After the judge discussed the situation with counsel, the jury was brought back into the courtroom and the court instructed them to resume their deliberations. (RT 2101-2112.)

The following day, the judge received several questions or statements from other individual jurors. (RT 2114.) Juror Ruthie Williams wrote: "I'm very uncomfortable at this point of what I am seeing. I would be remiss if I didn't say it. I make no apology, but I ask to be heard." She was brought into the courtroom and the court asked her to explain. She said she was upset and further deliberations were useless, and that Ms. Carter was biased and her mind was made up when she walked into the door to the jury room. Williams said that Ms. Carter was

avoiding the evidence and saying all the witnesses but defendant were lying. The other jurors would read the law to Ms. Carter and she would say "it doesn't mean that," and she would not pay attention to it. (RT 2117-2121.)

To get an example of what was going on, Ms. Williams said that when they started talking about the evidence and the law, Ms. Carter would say: "Well, she went into reorganization." The other jurors would explain that the crime was committed before the reorganization, but Ms. Carter would ignore the evidence and talk about the reorganization. Ms. Williams said that when page 37 of the jury instructions were read to Ms. Carter, Ms. Carter refused to follow it. Page 37 of the instructions read, "It is not a defense to a prosecution for theft that after the theft was committed, complete or partial restitution or offer of restitution was made to the owner of the stolen property

or that his loss was wholly or partly recouped by any other means." (RT 2117-2121.)

Juror Susanna R. Des Jardien wrote:

> Does juror no. 8 [Ms. Carter] have the right to systematically disregard the entire prosecution evidence and the law? For example, juror no. 8 dismissed Mr. Young's testimony about Dr. Ramos' $28,000 being deposited and spent mostly on projects other than Diamond Bar. We showed juror no. 8 the business ledgers, but she said, `I don't believe it.' Juror no. 8 has chosen not to believe the testimony of any witness except defendant.
>
> Juror no. 8 argued that the `fact' that the defendant planned to make restitution to the victims proved that she had no criminal intent. We showed her the law. She said, `I don't agree with it.'
>
> We asked juror no. 8 to substantiate her opinions. She read to us a subscription agreement and the written instructions the defendant gave her sales force. She claimed these documents proved her point.
>
> From the first day of deliberations it was clear that no matter what was said, no matter what the evidence, no matter what the law says, juror no. 8 would not change her opinion.
>
> I ask the court if there is any recourse or must juror no. 8 be allowed to thwart the legal process

by her refusal to live up to her oath?'
(RT 2124.)

The judge called Mrs. Des Jardien into the courtroom after Ms. Williams had left. The judge discussed her note with her and specific instances where Ms. Carter would refuse to follow or disagree with the law given in the jury instructions. Mrs. Des Jardien related that Ms. Carter insisted, contrary to jury instructions, that written evidence carried more weight than testimonial evidence. Mrs. Des Jardien further stated that Ms. Carter told the jurors that she did not agree with the law which stated that an offer of restitution was not a defense to the crime. (RT 2126-2131.)

Ms. Carter was then called into the courtroom. (RT 2135.) She denied that she ever said or held the belief that written evidence is inherently more trustworthy than testimonial evidence. (RT 2141.) The judge read to Ms. Carter the jury instruction which

stated, in essence, restitution is not a defense to a prosecution for theft. (RT 2141.) Ms. Carter told the court that she did not recall having extensive conversations with the jurors about that instruction. (RT 2141.) Further, she said she agreed with that law. (RT 2143.)

The judge then read to her the jury instruction which defined theft by embezzlement. (RT 2143.) Ms. Carter said that she agreed with that law and never stated that she did not agree with that law. (RT 2145.)

After some discussion with counsel, the trial court decided -- with the concurrence of the prosecutor and over the objection of defense counsel -- to question some of the other jurors to determine what was going on in the jury room and whether Ms. Carter was refusing to follow the instructions or not.

Juror Doris Castaneda (juror no. 1) was called into the courtroom and asked if she

felt there was any juror who was not following the law during the deliberations; she named Ms. Carter. When asked to elaborate, she explained Ms. Carter was interpreting the instructions in a different manner than the other 11 jurors, specifically the instructions regarding restitution and intent to defraud. According to her, no one made a statement that written evidence was inherently more believable that oral testimony. (RT 2155-2159.)

Ms. Castaneda was then excused and juror no. 2, Carol Hart, was brought in. She was asked similar questions and gave similar answers. She also mentioned that Ms. Carter kept bringing up the reorganization in connection with the restitution instruction and saying "that it was all right because [defendant] went into reorganization." (RT 2159-2163.)

The judge then ruled, pursuant to California Penal Code sections 1089 and 1123,

that there was good cause to excuse Ms. Carter for failure to follow the instructions as to the law. She was then discharged from the jury. (RT 2166, 2168, 2172.)

An alternate juror was put in the place of Ms. Carter. (RT 2169.) Juror no. 7, Mrs. Des Jardien, was also excused and replaced with an alternate juror. The court instructed the jurors that they were to disregard their prior deliberations, that they were to begin deliberations anew and that they were not to speculate on the reasons for the juror's dismissal. (RT 2171-2174.) It took the jury another three days to reach a verdict. (CT 127-129, 210.)

REASONS WHY THE PETITION SHOULD BE DENIED

ARGUMENT

I

THE PETITION MERELY SEEKS REVIEW OF THE STATE APPELLATE COURT'S APPLICATION OF STATE LAW TO SPECIFIC FACTS

The instant petition does not raise,

as a claimed certiorari-worthy issue, the question of whether the Constitution permits a judge to dismiss a juror during deliberations for good cause. Instead, the petition basically contends that the California Court of Appeal, in applying California law regarding good cause for dismissal of jurors,[2/] simply reached the wrong result in this case. (Petn. 7-8.) That is, petitioner does not take issue with the rules that a juror may be dismissed for failure to follow the law; he merely claims it was improperly done in this case. Nor could he take issue with that rule, as it is clear that jurors have a duty to deliberate in accordance with the jury instructions and his oath. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Nor does the petition raise the

---

2. The trial court applied California law authorizing discharge if jurors found to be unable to perform their duties, then Penal Code section 1123 (repealed Stats. 1988, ch. 1245, § 42). Now, the same authority is embodied in Penal Code section 1089.

issue of whether the Constitution permits the questioning of jurors as to their mental processes in reaching a verdict. Petitioner acknowledges that questioning jurors during deliberation as to a fellow jurors misconduct is permissible, at least to some extent. He seeks only a reapplication by this Court of those rules for a more favorable result.[3/] Petitioner's request for this Court to re-apply these rules of law to the specific facts of this case does not state a certiorari-worthy claim. See *United States v. Johnston*, 268 U.S. 220, 227 (1925). Insofar as petitioner seeks relief for any alleged violation of his Sixth Amendment rights in this case, his appropriate federal remedy, if

---

3. This petition does not present the question of whether jurors may be questioned as to their mental processes by which a verdict was arrived for the separate and distinct reason that the questioning in this case occurred <u>before</u> a verdict was reached. And, questioning jurors regarding possible jury misconduct during deliberations is clearly permissible. *Tanner v. United States*, 483 U.S. 107, 125-127 (1987).

any, is the one he is currently pursuing -- a writ of habeas corpus in the United States District Court.

II

PETITIONER'S FAILURE TO PROPERLY PRESERVE THE FEDERAL CLAIM AT THE TRIAL AND APPELLATE LEVEL PRECLUDES REVIEW BEFORE THIS COURT

Petitioner's failure to preserve the alleged Sixth Amendment violation at the trial and appellate courts stands as a second, independent reason why this Court should not review his claim. It is clear that this Court will not review federal questions which are not seasonably raised and passed upon by the state court below. *City of Canton, Ohio v. Harris*, ___ U.S. ___, ___; 109 S.Ct. 1197, 1203, fn. 5 (1989); *DeShaney v. Winnebago County DSS*, ___ U.S. ___, ___; 109 S.Ct. 988, 1003, fn.2 (1989).

In this case, petitioner never objected at trial on the basis of any claim of a violation of the Sixth Amendment. Instead,

petitioner merely objected to the trial court's actions based upon state law. (RT 2089, 2089, 2110.) The only suggestion at trial that petitioner might be raising a federal claim was a fleeting reference, after the juror had been dismissed and the adverse verdict returned, in his lengthy motion for new trial. (Clerk's Transcript [hereinafter "CT"] 292-306.) In his motion, petitioner spent eleven pages delineating the reasons for requesting a new trial, and made only one passing, generalized comment concerning the federal Constitution, to wit: "Litigants are constitutionally entitled to the complete and thoughtful consideration of their cases by the jury. (U.S. Constitution, Sixth and Seventh Amendments, California Constitution, Article I, Section 16)." (CT 292.)

A litigant must follow the state procedural rules to raise a federal question, and any failure to do so is grounds for denial of his writ of certiorari. *In re Lamkin*, 355

U.S. 59 (1957). In California, in order to preserve an error for appellate review, an objection must be explicit, timely, based upon specific grounds, and pursued to a final ruling. *California Evidence Code, section* 353. According to that rule, the sentence in petitioner's new trial motion as a basis for objection pursuant to the federal Constitution would be an insufficient objection not only because it lacked specificity but also because it was untimely. See, e.g., *People v. Wright*, 48 Cal.3d 168, 186-189, 255 Cal.Rptr. 853, 862-864 (1989); *People v. Coleman*, 46 Cal.3d 749, 777, 251 Cal.Rptr. 83, 102, U.S cert. den., 109 S.Ct. 1578 (1988); *People v. Sassounian*, 182 Cal.App.3d 361, 401 n. 39, 226 Cal.Rptr. 880, 902, U.S. cert. den. 109 S.Ct. 1578 1039 (1986). Accordingly, petitioner's failure to so object, as required by state law, bars its consideration herein. *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985).

Likewise, petitioner's failure to

pursue his alleged Sixth Amendment violation in his appeal to the California Court of Appeal prohibits review by this Court. In order for this Court to review petitioner's claim, the issues he now raises must have been pursued on appeal in the state courts in the manner and degree of specificity required by the state rules of practice. *Beck v. Washington*, 369 U.S. 541, 549-554 (1962). Under state law, an appellant's failure to raise and discuss errors before an intermediary Court of Appeals precludes further appellate review. California Rules of Court, rule 29(b)(1); *People v. Norris*, 40 Cal.3d 51, 57, 219 Cal.Rptr. 7, 11 (1985). By the same token, a point which is merely asserted by a state appellant without an argument of or authority for its proposition is deemed without foundation and requires no discussion by the reviewing court. *People v. Callegri*, 154 Cal.App.3d 856, 865 202 Cal.Rptr. 109, 119 (1984).

In his 12-page opening brief before the California Court of Appeal, petitioner only cursorily mentioned a violation of the federal Constitution in an argument heading which reads: "`Liberty' which is sacrosanct and guaranteed by the United States Constitution Trial-By-"Peers," was denied to appellant when the judge deliberated with the jury." (Appellant's Opening Brief, p. 7.) Petitioner's failure to comply with the state rules of appellate procedure should preclude review of certiorari.

III

PETITIONER HAS FAILED TO PRESENT AN "IMPORTANT" QUESTION SUFFICIENT TO WARRANT THE GRANT OF CERTIORARI

In order to warrant the writ of certiorari, the state court must have decided "an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. Rule 10. Petitioner

has failed to show this is so.

The unpublished decision in this case does not fall within the parameters of Rule 10. The decision, first, has limited application. Because it is unpublished, it cannot even be cited in future California cases for precedent. California Rules of Court, rule 977. Moreover, the decision was rendered by an intermediary court of review and not the final court of review in California. Accordingly, its authority is limited to the parties themselves, and binds no other court.

Second, the rules regarding when a juror can be dismissed for cause and when questioning of that juror is appropriate have been decided with uniformity in the federal courts. Under applicable federal law, when the trial judge is made aware of possible juror misconduct, it is under a duty to make inquiries to remedy the juror misconduct. *Smith v. Phillips*, 455 U.S. 209, 215 (1981);

Remmer v. United States, 347 U.S. 227, 229-230 (1953); *United States v. Perez*, 658 F.2d 654, 663 (9th Cir. 1981); see also *United States v. Butler*, 822 F.2d 1191, 1196 (D.C. Cir. 1987); *United States v. Polizzi*, 500 F.2d 856, 881 (9th Cir. 1974). "Moreover, jurors are observable by each other, and may report inappropriate juror behavior to the court before they render a verdict." *Tanner v. United States, supra*, 483 U.S. 107, 127 (emphasis original.)

When confronted with possible juror misconduct, the trial court has broad discretion to fix the exact procedures to balance the need to make a sufficient inquiry against a concern that the inquiry not create prejudicial effects by unduly magnifying any alleged misconduct. *United States* v. *Butler, supra*, 822 F.2d at 1196; *United States* v. *Peterson*, 524 F.2d 1167, 176-177 (4th Cir. 1975). Under federal law, because the trial court views the juror first hand, reversal is

only appropriate upon demonstration of abuse of discretion. *United States* v. *Perez*, *supra*, 658 F.2d at 663; *United States* v. *Peterson*, *supra*, 524 F.2d at 176-177.

California law, which was explicitly applied in this case by the California Court of Appeal, is harmonious with the aforenoted federal rules.

Notably, petitioner does not contend that the applicable federal law is different. He merely asks this court to reapply the established precedent differently to this case. Thus, the issue is not one likely to recur nor of sufficient significance to warrant the granting of certiorari.

IV

REPLACEMENT OF JUROR NUMBER EIGHT, MS. CARTER, FOR GOOD CAUSE WAS IN ACCORDANCE WITH THE SIXTH AMENDMENT

Petitioner contends that the trial judge replaced a juror without good cause after deliberations had begun; that the juror

was dismissed for interpreting the law and facts in a manner different from the other 11 jurors; that the trial court violated petitioner's right to an impartial jury by examining the jurors on their thought processes; and that the court erred in failing to declare a mistrial. (Petn. 3-11.) Petitioner is mistaken.

The United States Constitution guarantees the right to a trial by jury. (U.S. Constitution, amend. VI.) Among the essential elements of the right to trial by jury are the requirements that a jury in felony prosecution consist of 12 persons and that its verdict be unanimous. *Cabana v. Bullock*, 474 U.S. 384, 386 (1986); *United States v. Renfro*, 620 F.2d 569, 577 (6th Cir. 1980).

In the present case, juror no. 8, Ms. Carter, was dismissed because of her inability to do her duty and follow the instructions and the oath given to her. Ms.

Carter was replaced with one of the three alternate jurors. (RT 2167-2175.) Thus, the jury panel here consisted of 12 jurors and these 12 jurors agreed to a unanimous verdict of guilty. The alternate jurors were selected and accepted in case one of the other jurors could not continue.

The trial court did not err in failing to call for a mistrial. Upon receiving information of possible juror misconduct, the trial court properly made further inquiries.

Whether or not a jury should be discharged pursuant to Penal Code sections 1089 and 1123 is within the discretion of the trial court. *People* v. *Burgener*, 41 Cal.3d at 519, 224 Cal.Rptr. 112, 121 (1986). "However, California cases construing these statutes have established that, once a juror's competence is called into question, a hearing to determine the facts is clearly contemplated. (*Id.*, at 519-520, 224 Cal.Rptr. at

121.) Here, questions and notes from the jury were sufficient to raise the possibility that Ms. Carter was not following the instructions of the court. Therefore, under California law, the trial court was under a duty to conduct a hearing to determine whether good cause existed to discharge the juror.

Petitioner contends that once the trial court learned the jury was deadlocked 11 to 1 and it became clear that Ms. Carter would not submit to the pressure and change her vote, a mistrial should have been declared. Further, the trial court erred in questioning her as to her thought processes. (Petn. 8-11.)

However, in this case, the court was not trying to get a verdict from the jury. It was dealing with the possibility of juror misconduct, and with a situation where the possibility of deadlock was due to the holdout juror's refusal to do her duty and to follow the instructions given her which would

authorize her discharge from the jury.

As was noted in Argument III, *supra*, federal law is harmonious with California law. While the federal rule only permits substitution of a juror prior to the jury's retirement for deliberations, this requirement is not constitutionally mandated. Federal Rules Criminal Procedures, rule 24(c); *United States v. Phillips*, 664 F.2d 971, 992 (5th Cir. 1981), U.S. cert. den. 457 U.S. 1136, 459 U.S. 906.

In *Miller* v. *Stagner*, 757 F.2d 988 (9th Cir. 1985) U.S. cert. den. 475 U.S. 1048, the Ninth Circuit found that the California substitution procedure pursuant to California Penal Code sections 1089 and 1123 preserved the "essential feature" of the jury required by the Sixth and Fourteenth Amendments. (*Id.*, at 995.)

Therefore, under State and Federal procedures, the trial court here, when put on notice of possible juror misconduct by Ms.

Carter's refusal to follow the law, had a duty to make an inquiry into that alleged misconduct and properly did not declare a mistrial.

It is true that a juror cannot be dismissed if the record shows that the reason for dismissal was that the juror harbored doubts about the sufficiency of the government's case. (*United States* v. *Brown*, 823 F.2d 591, 596-597 (D.C. Cir. 1987).) But, a juror has the duty to deliberate in accordance with the jury instructions and his/her oath. See, *Wainwright* v. *Witt*, 469 U.S. 412, 424, (1985); *People* v. *Ghent*, 43 Cal.3d 739, 767-769, 239 Cal.Rptr. 82 (1987). Ms. Carter's refusal to follow the law as instructed violated her oath as a juror.

The court's questions were not designed to inquire into the jurors' thought processes with the intent of impeaching the jury's verdict. In the present case, the trial court did not seek to correct or affirm

the juror's interpretation of the law but was merely trying to determine whether Ms. Carter was refusing to follow the law as given to her by the trial court which was a breach of her oath as a juror.

A juror may properly be discharged even though he or she claims to be able to do his or her duty. *United States* v. *Perez*, *supra*, 658 F.2d at 663; see *People* v. *Abbott*, 47 Cal.2d 362, 371, 303 P.2d 730 (1956); *People* v. *Farris*, 66 Cal.App.3d 376, 386, 136 Cal.Rptr. 45 (1977). The court may look to other evidence besides the juror's claims. (*Miller* v. *Stagner*, *supra*, 757 F.2d at 995; *People* v. *Abbott*, *supra*; *People* v. *Farris*, *supra*.)

In the present case, the trial court was free to disbelieve Ms. Carter's assertions. In fact, four other jurors testified contrary to Ms. Carter. The record clearly shows that Ms. Carter was unable to perform her duty as a juror to follow the instructions

as given to her by the trial court.

The main concern when an alternate juror has been substituted in after deliberations have begun is that the alternate might be coerced by jury members who have already formulated positions, viewpoints, and opinions. (*United States* v. *Phillips*, *supra*, 664 F.2d at 995.)

In the present case, two alternate jurors not just one, were replaced at the same time; thus the alternates were not the sole newcomers nor were they by themselves to face the other jurors. The fact that the jury deliberated another three days before reaching a verdict shows that the alternates did not feel pressure to reach a quick verdict by the others.

Accordingly, the trial court properly discharged Ms. Carter from the jury on the grounds she was unable to perform her duty and replaced her with an alternate. Petitioner's request for writ of certiorari

should be denied.

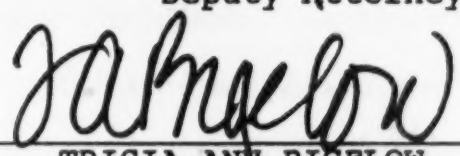
CONCLUSION

For the reasons set forth above, respondent respectfully requests the Petition for Writ of Certiorari be denied.

DATED: June 7, 1990

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California
RICHARD B. IGLEHART
Chief Assistant Attorney General
EDWARD T. FOGEL, JR.
Senior Assistant Attorney General
DONALD E. de NICOLA
Supervising Deputy Attorney General
TRICIA ANN BIGELOW
Deputy Attorney General



TRICIA ANN BIGELOW
[Attorney of Record]

Attorneys for Respondent

No. 89-1505

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOAN BETTS DIPLARAKOS, Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA, Respondent.

PROOF OF SERVICE UNDER RULE 29.5(c)

I, JOSEPHINE D. ROSE, declare as follows:

I am over 18 years of age, and not a party to the within cause; my business address is 3580 Wilshire Boulevard, #800, Los Angeles, California 90010;

I served 40 copy(ies) of the **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in the above entitled case on the following person(s):

ALAN H. STOKKE [Attorney for Petitioner]
ATTORNEY AT LAW (714) 543-7704
888 WEST SANTA ANA BLVD., #200
SANTA ANA, CA 92701-4561

by placing same in an envelope(s) addressed to the post office address of each said person(s), and by sealing and then depositing each said envelope, on JUN 8 - 1990, in the United States mail at Los Angeles, California, with first-class postage thereon fully prepaid;

I thereby have served all parties required to be served:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JUN 8 - 1990 at Los Angeles, California.

DECLARANT

JOSEPHINE D. ROSE